RAFAEL DE ASÍS ROIG
FRANCISCO JAVIER ANSUÁTEGUI ROIG
(Dirs.)

Essays on human rights

THOMSON REUTERS
ARANZADI

Primera edición, 2015

THOMSON REUTERS PROVIEW eBOOKS
Incluye versión en digital

Editorial Aranzadi, SA
Camino de Galar, 15
31190 Cizur Menor (Navarra)
ISBN: 978-84-9059-949-5
Depósito Legal: NA 1537/2015
Printed in Spain. Impreso en España
Fotocomposición: Editorial Aranzadi, SA
Impresión: Rodona Industria Gráfica, SL
Polígono Agustinos, calle A, nave D-11
31013 Pamplona

For Gregorio Peces-Barba

Chapter 3

Women in the 20th century. The equality challenge in regulation and case law

Mª. ÁNGELES BENGOECHEA GIL
Universidad Pontificia Comillas – ICADE

1. A CHALLENGE FOR THE 20TH CENTURY: EQUALITY BETWEEN MEN AND WOMEN, OVERCOMING PATERNALISM AND PUTTING AN END TO AN ANDROCENTRIC SOCIETY

A priori, it is difficult to reject the demand for equality, since it is considered desirable and positive[1], an ideal to achieve in the social, economic and political spheres, among others[2]. In the 20th century, such demand has become more concerned with the struggle for equality between men and women both in Europe and in Spain. It has been an objective for regulation and case law.

At the same time, it is not easy to support this demand for equality, because it is not that simple to determine the "degree" of equality or inequality for women. This is further complicated by the fact that demanding

1. See BOBBIO, N., *Igualdad y libertad,* translated by Pedro ARAGÓN RINCÓN, Ediciones Paidós, I.C.E. de la Universidad Autónoma de Barcelona, Barcelona, 1993, p. 53. In this author's words, "in the political language, equality has mainly a positive emotional meaning, that is, it refers to something desired". See also SAVATER, F., "La tradición filosófica de la igualdad", *Claves de Razón Práctica,* nº 36, 1993, p. 12.
2. See CALSAMIGLIA, A., "Sobre el concepto de igualdad" in MUGUERZA *et al.*, *El fundamento de los derechos humanos,* Debate, Madrid, 1989, p. 99, where he develops the argument that equality is a popular political ideal, something sought by the whole society.

equality for women necessarily requires a correlative, someone with respect to whom such equality is demanded: men. Therefore, when analysing equality, a reference should be made to those who we consider equal and in what respect[3]. The holders and objects with regard to which equality is vindicated have to be identified[4]. It is necessary to include a reference to the kind of good or value according to which equality must be reached, as well as to the parameters and criteria that define and measure such equality[5].

And so the challenge for the 20th century emerges: trying to determine which differences between men and women are to be considered positive and which negative; which shall be protected and which eliminated. The law should equate or differentiate depending on the case in order to attain equality and allow women to enjoy all their rights. In this regard, it has been argued that "it is no exaggeration to say that the role of law is to establish differences"[6].

Tawney even finds a possible economic and social benefit in defending and promoting personal differences[7]. In other words, differences in the social order based on efficiency or individual merit are fully justified. In this sense, social and economic betterment will result from the preservation of the so-called *natural inequalities* and the rejection of other type of inequalities –*social and economic*– for their arbitrary nature and because they are the result of social bias[8].

3. Ara Pinilla, I., "Reflexiones sobre el significado del principio constitucional de igualdad", in *El principio de igualdad*, Luis García San Miguel (Ed.), Dykinson, Madrid, 2000, p. 203, notes that "the relational characterization of the principle of equality is in any case insufficient if it the reference aspects of the subjects considered as equal are not determined...".
4. Bobbio, N., *Derecha e Izquierda. Razones y significados de una distinción política*, translated by A. Picone, Taurus, Madrid, 1995, pp. 136-137, has pointed out how "the concept of equality is relative, not absolute. It is relative to at least three variables which have to be taken into account every time the desirability of equality or its practicability are discussed: (a) the individuals between whom benefits and obligations should be shared; (b) the benefits or obligations to be shared; (c) the criteria by which they should be shared".
5. See Sen, A., *Nuevo examen de la desigualdad*, Spanish version by Ana María Bravo, revised by Pedro Schwartz, Alianza Editorial, Madrid, 1995, p. 13.
6. Rubio Llorente, F., "La igualdad en la jurisprudencia del Tribunal Constitucional", *Revista Española de Derecho Constitucional*, January-April, 1991, p. 16, where he also points out that "Law is both a differentiation and an equation factor".
7. Tawney, R. H., *Igualdad*, translated by F. Giner, Fondo de Cultura Económica, México, 1945, pp. 148 *et seq.*
8. In this regard, Tawney R. H., notes in *Igualdad, cit.*, pp. 147-148, that: "the inequalities of the old régime had been intolerable because they had been arbitrary, the result not of differences of personal capacity, but of social and political favouritism. The inequalities of industrial society were to be esteemed, for they were the

Ferrajoli follows that same line of reasoning by arguing that the modern principle of equality is a "complex principle that includes personal differences and excludes social differences"[9]. Hence, certain differences that define individuals' identity are regarded as positive, and they should be incorporated and protected under the concept of equality. However, alongside these personal differences there are others –social and economic ones– that give rise to *inequalities*[10]. The purpose of equality is to protect and recognize differences, while eliminating inequalities[11]. The problem Ferrajoli does not acknowledge is that in many occasions social inequalities have been especially harsh on women, and they have defined the "female identity" and certain negative personal differences compelling women to specific roles established by society[12]. That is why the personal is often "confused" with the social, and the distinction between them is blurred. In order to explain this last statement, it may be noted that law works through hypotheses whose legal consequences differentiate people who are not in the same situation. Therefore, to legislate is to differentiate. If the legislator placed everyone in the same legal and factual positions, it would adopt unjust and absurd rules

expression of individual achievement or failure to achieve. They were twice blessed. They deserved moral approval, for they corresponded to merit. They were economically beneficial, for they offered a system of prizes and penalties. So it was possible to hate the inequalities most characteristic of the eighteenth century and to applaud those most characteristic of the nineteenth. The distinction between them was that the former had their origin in social institutions and the latter in personal character. The fact of equality of legal rights could be cited as a reason why any other kind of equality was unnecessary or dangerous". He then argues that "rightly interpreted, equality meant, not the absence of violent contrasts of income and condition, but equal opportunities of becoming unequal".
9. Ferrajoli, L., *Derecho y razón: Teoría del garantismo penal*, translated by Perfecto Andrés Ibañez, foreword by N. Bobbio, Trotta, Madrid, 1995, p. 906.
10. Ferrajoli, L., *Derechos y garantías. La ley del más débil*, translated by Perfecto Andrés Ibáñez and Andrea Greppi, Ed. Trotta, Madrid, 1999, notes that "differences –either natural or cultural– are nothing but the specific features that distinguish and at the same time individualize people and, as such, are protected by the fundamental rights". In turn, inequalities, either economic or social, are "the disparities between subjects resulting from their different property rights and their situation of power and subjection", p. 82.
11. Ferrajoli, L., *Derecho y razón: Teoría del garantismo penal*, argues that "some should be acknowledged in order to be respected and guaranteed; the others must also be acknowledged in order to remove or compensate them to the extent possible", p. 907.
12. See Pitch, T., "Libertad femenina y derechos" in *Mujeres, derechos y ciudadanía*, Mestre, R. (Coord.), Tirant lo Blanc, Valencia, 2008, p. 124, where she refers to Ferrajoli's approach and states that "the feminine difference has not only led to exclusion, marginalization and oppression, but these exclusions, etc. have been core elements of the female identity".

that would lead to an impracticable system[13]. That is, only discriminatory and arbitrary differentiations are prohibited, meaning that differentiations must be justified[14]. Thus, the demand for equality between men and women does not imply that differences should not exist. Any equality policy entails differentiation, but a positive one.

Notwithstanding the foregoing, a problem arises when personal differences –being a man or a woman– become the root of negative social differentiations instead of a positive factor. In other words, society itself builds inequality. That is, for instance, what has happened with the concept of *gender. Gender* as a sociological notion refers to a relational category that allows an asymmetrical understanding of the relationships between men and women. This asymmetry shows the social construction around "men" and "women", and the features and capabilities attributed to people on the basis of their sex. The notion of "gender" is confused with "sex", when they are actually quite different. *Gender* emphasizes the social nature of inequalities as opposed to the biological difference within the concept of *sex*. Gender identity (being a man or a woman) is based on the sexual difference (being born as a male or a female). Such gender identity is the cause of inequality, since belonging to a certain sex determines an unequal social position.

Alda Facio has rightly pointed out that women have interests and needs specific to their sex which may or may not coincide with men's[15]. If an apparently "neutral" concept of needs and rights is formulated on the basis of the "man-subject", there is obviously no such neutrality. It should not be forgotten that society is established on androcentric, non-neutral and paternalistic bases. That is, our society is focused on male human beings and deploys a paternalistic attitude towards women, who are regarded as inferior. This is what Barrere called "false universalism"[16] and Bodelon "the false neutrality of the law"[17].

13. See ALEXY, R., *Teoría de los derechos fundamentales*, translated by Ernesto GARZÓN VALDÉS, revised by Ruth ZIMMERLING, Centro de Estudios Constitucionales, Madrid, 1993, p. 384.
14. See DE OTTO, I., "El principio de igualdad en la Constitución Española", *Igualdad, desigualdad y equidad en España y México*, Colegio de México, 1985, p. 351, who argues that "the rationale of the principle of equality is to require a justification for inequality".
15. FACIO MONTEJO, A., *Cuando el Género suena, cambios trae.(Una metodología para el análisis de género del fenómeno legal)*, San José, CR, ILANUD, 1999, p. 16.
16. See BARRÈRE UNZUETA, Mª. Á., "Iusfeminismo y derecho antidiscriminatorio: hacia la igualdad por la discriminación", in *Mujeres, derechos y ciudadanía*, MESTRE, R. (Coord.), Tirant lo Blanc, Valencia, 2008, p. 54.
17. BODELON, E., "La transformación feminista de los derechos", in *La lucha por la igualdad efectiva de mujeres y hombres. Reflexiones y aportaciones de la Ley de Igualdad 3/2007 de 22 de marzo*, BENGOECHEA GIL, Mª. A. (Ed.) Colección Debate nº 10, Dykinson, Madrid 2010. She notes that "legislative processes have rarely reflected feminist proposals and approaches, and they have often distorted and emasculated the feminist demands. The causes lie, among others, in the false neutrality of law, its androcentric nature, and in the failure to recognize the role of feminist movements", p. 93.

The root of the social construction of contemporary inequality between men and women must be read in its context: the development of industrialization and the consolidation of advanced capitalism. It is against this background that the new socioeconomic organization of Western industrial societies fosters an increasing physical separation between private (domestic) and public (commercial) sphere, as well as the allocation of different responsibilities with unequal values to men and women in one realm and the other. Those who are born as *females* build their identity – being a woman– assuming the attributes common among women, namely being a wife, a housewife and a mother, confined to the private sphere. Those born as *males* build their identity –being a man– by becoming heads of household or the "providers", focusing on the public sphere.

The 20th century faces the double challenge of eliminating the rules that undervalue the activities labelled as feminine and, at the same time, closing the pay gap between men and women. Society is structured in such a way that there are women devoted exclusively to household tasks; and those who work outside the home usually not only earn less but also face a "glass ceiling" and "double presence" or double working day because they don't delegate the domestic work.

The problem is exacerbated because in the capitalist society the periods devoted to the highest working production coincide with those of reproduction, that is, the moment when a woman decides to be a mother. It should not be forgotten that women also devote their time to motherhood, and most of the times this does not have any social or economic recognition and remains almost invisible. The challenge is therefore to combine work and motherhood. But in the 20th century, the transformation of this new social role of women working outside the home is resisted by the social context. Not enough public welfare services are provided, which is why individual solutions are often sought: grandparents, friends, neighbours, etc., in order to solve the problem of "working mothers". The more personal and material resources available for women, the better they will manage and combine motherhood and outside work.

This is one of the underlying discriminations in the 20th century: the discrimination of women at work, *i.e.* the unequal access of men

and women to certain positions in the work market partly due to the reasons already mentioned. The fight against this discrimination at work and for the visibility of women in public life is the main concern of *liberal feminism*[18].

Liberal feminism developed between the 60s and the 70s and demands individual rights for women: self-determination, freedom of choice, access to education and equal opportunities, which require *certain* redistributive policies. The starting point for part of liberal feminism is that society still believes that women have to play a role of mother and caregiver that confines them to the household or compels them to a "double working day".

This problem, which often makes women feel guilty for not being able to fully perform their household role, is analysed from the point of view of liberal feminism by Betty Friedan. This author discusses women's restlessness and anxiety when, by having to fill the role of housewife, mother and caregiver, their ambitions for personal and professional development are completely disregarded. It is "the problem that has no name"[19]. She argues that there are actually no role models for women to follow, and those who find a way out of their established roles attract social reprobation. In this context, the warmth of home is the maximum aspiration of men, and the mystification of such wish becomes women's reason for living. Women even have "guilty feelings about being ambitious"[20]. Women have to design a life plan according to their capacities, because women's education is impoverished: they get married ever younger, they don't attend college and limit their jobs to "feminine" sectors. The way out of this "trap" depends on the search for culture and qualification for a job. Liberal feminists criticize contemporary sexual habits and rules, for they are the concrete expression of women's subordination. Equality policies are the main institutional response to the problem of lack of equality between men and women in Western welfare democracies. The purpose is to grant equal rights and opportunities to women in all spheres of economic, social, political and cultural life.

18. On feminism, see, inter alia, AMORÓS, C., *Teoría feminista: de la ilustración a la globalización*. (Vol. I, II and III), Madrid, Minerva Ediciones, 2005.
19. See FRIEDAN, B., *La mística de la feminidad*, Cátedra, Madrid, 2009, where she argues that "the fact that women did not become professionals themselves, the reluctance of women in the last twenty years to commit themselves to work, paid or unpaid, requiring initiative, leadership and responsibility is due to the feminine mystique" (p. 385); and adds that "The problem that has no name –which is simply the fact that American women are kept from growing to their full human capacities– is taking a far greater toll on the physical and mental health of our country than any known disease" (p. 402).
20. FRIEDAN, B., *La mística de la feminidad*, *cit.*, p. 393.

As we shall see in the following sections, these equality policies for the elimination of the historical discrimination faced by women have been a goal for regulation and case law. We will focus on Spain and Europe in order to assess to what extent equality between men and women is a reality in the 20th century.

2. THE DEMAND FOR EQUALITY BETWEEN MEN AND WOMEN IN 20TH CENTURY SPAIN

In the 20th century, the fight for equality between men and women at the normative level in Spain is basically focused on the explicit recognition of the obligation to ensure equality between sexes under the Spanish Constitution of 1978 (CE). Furthermore, the Spanish Constitutional Court has sought to shape the key concepts for the elimination of discrimination on the grounds of sex, such as *indirect discrimination* or *affirmative action*.

2.1. REGULATORY LEVEL: THE SPANISH CONSTITUTION

Our Constitution has enshrined equality in its two dimensions: material equality and formal equality. Both are essential for the principle of equality and not mutually exclusive. Together, they foster women's equality and contribute to eliminate the historical discrimination suffered by them. In this regard, it should be borne in mind the double role played by the principle of equality in our Constitutional system, for "on the one side it is an essential goal or purpose to be achieved in the socio-economic order (art. 9[2]); and on the other, it is a general guarantee of the underlying validity of the legal system itself (art. 14)"[21]. As Prof. Peces-Barba points out, formal equality is a "principle or general guidance as to how human beings should be treated", whereas material equality "refers to facts, such as basic needs or the economic and social reality"[22].

2.1.1. Article 14 CE – Formal equality and the prohibition of discrimination

Article 14 of the Spanish Constitution literally states that "Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance". This provision establishes the

21. PÉREZ LUÑO, A. E., "Sobre la igualdad en la Constitución Española", *Anuario de Filosofía del Derecho*, Nueva Época, vol. IV, 1987, p. 143.
22. PECES-BARBA, G., *et al.*, *Curso de derechos fundamentales. Teoría General*, in collaboration with Rafael DE ASÍS ROIG, Ángel LLAMAS CASCÓN, and Carlos FERNÁNDEZ LIESA, Universidad Carlos III/ Boletín Oficial del Estado, Madrid, 1995, p. 284.

requirement of formal equality and, at the same time, the prohibition of discrimination.

As will be seen, formal equality develops through two basic features which are not contemporary with each other: equality *before* the law and equality *in* the law. Equality *before* the law (or in the application of the law) is expressly set forth in Article 14 of the Constitution, and there is no explicit mention of equality *in* the law (or in the content of the law). Therefore, although Article 14 does not refer specifically to both dimensions of formal equality, both shall be considered included[23].

It should be recalled that the existence of formal equality does not require in any way an absolute equality. Quite to the contrary, differentiation is necessary precisely to achieve equality and to eliminate discrimination. It is commonly accepted by the literature and case law that the principle of formal equality enshrined in Article 14 does not mean that all differences in treatment are absolutely prohibited. Only discriminatory differences are excluded, which implies that any differentiation has to be justified[24]. Such difference in treatment does not hinder but promotes equality before the law, and it can foster material equality, since general redistribution criteria can be taken into account for the satisfaction of needs[25].

According to this approach, and within the limits set by the Constitution, different treatment between men and women is possible provided that the purpose is to eliminate discrimination. That is, the

23. JIMÉNEZ CAMPO, J., "La igualdad jurídica como límite frente al legislador" in *Revista Española de Derecho Constitucional*, nº 9, 1983, pints out that equality "projects over the whole of the legislative work in all its possible determinations" and "must also be respected by the legislator". Therefore, it is not possible to justify the immunity of the legislator or to determine an area in the legislative work "exempt from constitutional review", pp. 85-89. See also TEROL BECERRA, M. J., in "Acerca del Principio de Igualdad", *Temas Laborales. Revista andaluza de Trabajo y Bienestar Social*, nº 29, 1993, p. 84, who points out that "the equality before the law enshrined by that provision comprises equality in the law or in the content of the law and equality in the application of the law".
24. See TEROL BECERRA, M. J., who argues that "the principle of equality prevents the legislator from establishing different treatment based on factual situations which are contrary to the Constitution, or inferring irrational arbitrary legal consequences from different perfectly constitutional factual situations" in "Acerca del principio de igualdad", *cit.*, p. 86. See also DE OTTO, I., "El principio general de igualdad en la Constitución Española", *Igualdad, desigualdad y equidad en España y México*, Colegio de México, 1985, p. 351. He notes that "the rationale of the principle of equality is to require a justification for inequality".
25. See PECES-BARBA, G., *Los valores superiores*, Tecnos, Madrid, 1984, p. 155.

Constitution allows for that possibility, but it is for the legislator "to determine how the law defines different situations"[26].

In Spain, however, during the 20th century, different treatment on the grounds of sex has been shaped by the case law of the Constitutional Court rather than by the legislator. It is not until the 21st century when some progress towards equality between men and women is made in the normative sphere[27].

The possibility of providing different treatment in favour of women is also confirmed by the second paragraph of Article 14 of the Spanish Constitution. Along with the requirement of formal equality, there is an express prohibition of discrimination on the grounds of sex. That is, sex-based discrimination is prohibited, but the measures to level the playing field and to reach equality between men and women –either through *affirmative action* or *reverse discrimination*–[28] are not[29].

It has been noted that the framers of the Constitution considered the discrimination referred to in Article 14 –including the discrimination on the grounds of sex– "a particularly harmful, dangerous and intolerable kind of social inequality"[30], since their negative connotations identify them with partiality, damage and favouritism[31].

26. TEROL BECERRA, M. J., "Acerca del principio de igualdad", *cit.*, p. 85.
27. For example, the laws adopted in Spain in the 21st century; regarding the "Equality Act" 3/2007, see BENGOECHEA GIL, Mª. Á., "La ley de Igualdad 3/2007 de 22 de marzo: el reto de erradicar discriminaciones" in *La lucha por la igualdad efectiva de mujeres y hombres. Reflexiones y aportaciones de la Ley de Igualdad 3/2007 de 22 de marzo*, BENGOECHEA GIL, Mª. A. (Ed.) Colección Debate nº 10, Dykinson, Madrid 2010; as regards Act 1/2004 on protective measures against gender-based violence, see GIL RUIZ, J. Mª., *Los diferentes rostros de la violencia de género: ensayo jurídico a la luz de la Ley Integral (L.O. 1/2004, de 28 de diciembre) y la Ley de Igualdad (L.O. 3/2007, de 22 de marzo*, Dykinson, Madrid, 2007.
28. In order to distinguish between both measures, see BENGOECHEA GIL, Mª. Á., "Acciones positivas y discriminaciones inversas: dos instrumentos para hacer efectiva la igualdad entre hombres y mujeres" in *Mujer, libertad e igualdad. Un homenaje a Enriqueta* Chicano, Aranzadi-Thomson, Madrid, 2007.
29. See REY MARTÍNEZ, F., *El derecho fundamental a no ser discriminado por razón de sexo*, McGraw-Hill/ Interamericana de España, Madrid, 1995, p. 60. Regarding these traditionally discriminated groups there is what the author calls "a comprehensive three-level anti-discriminatory model", consisting in: 1. prohibition of direct discrimination; 2. prohibition of indirect discrimination; 3. *reverse discrimination* are accepted.
30. REY MARTÍNEZ, F., *El derecho fundamental a no ser discriminado por razón de sexo, cit.*, p. 57.
31. See BARRÈRE UNZUETA, Mª. A. *Discriminación, Derecho antidiscriminatorio y acción positiva en favor de las mujeres*, Madrid, Civitas, 1997, pp. 19 *et seq.*

Differences suffered by groups traditionally exposed to discrimination –like women– are thus regarded as *suspicious* until otherwise proven[32]. Women belong to a *group under the presumption* of discrimination because traditionally they have been one of the groups most affected by discrimination. Therefore, regardless that during the 21st century such *presumption* has extended to other groups (especially considering the open clause in Article 14 of the Spanish Constitution), it can be said that the special protection granted by the case law of the Constitutional Court is mainly limited to sex-based discrimination[33]. This entails that certain references included in Article 14 are deemed as *reasonable*, like for instance any difference based on birth, language or age, and are not necessarily considered discriminatory[34].

2.1.2. Article 9(2) CE – Material equality

The principle of material equality is enshrined in Article 9(2) of our Constitution, which entrust public authorities to "to promote conditions which ensure that the freedom and equality of individuals and of the

32. See Rey Martínez, F., *El derecho fundamental a no ser discriminado por razón de sexo, cit.*, p. 59.
33. Our Constitutional Court has identified certain categories where any differentiation must be subject to control, since they are potentially discriminatory. See for instance STC 19/1989 of 31 January, where the Court argues that "more specifically, the express prohibition of discrimination on the grounds of sex not only entails the ban on unjustified unequal treatment, but also the constitutional decision to put an end to the historical situation of inferiority attributed to women in social life, particularly in the sphere of employment and working conditions. Therefore, in principle, measures that aim at counteracting the disadvantaged situation of certain social groups and, in particular, at remedying women's traditional situation of inferiority in the social and employment fields, cannot be considered contrary to the principle of equality, even when they provide for more favorable treatment. This approach is now customary in most recent international standards on equality and non-discrimination". See also STC 103/1983 of 22 November, which refers to *groups under a presumption of discrimination*, noting that "Article 14 of the Constitution also establishes a set of discriminatory cases that can be considered typical, which most certainly include differentiation or discrimination on the grounds of sex regarding legal treatment".
34. See STC 75/1983 of 3 August, on an exception of unconstitutionality raised with regard to Article 28(2)(b) of the Special Act for the city of Barcelona (1960), which sets maximum age limits for the civil servants applying for certain positions in the Administration of the referred city. In its reasoning, the Court accepts that this provision is in line with the Constitution, since not all limits are unlawful, and argues that "since age is in itself a differentiating factor, a legislative decision that objectively sets age limits preventing those exceeding them from being appointed to certain posts shall be considered valid", provided that such differentiation is justified (Legal Basis 3). In this case, the improvement of the administrative service is a sufficient basis.

groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life".

While formal equality requires equal relationships in the content and application of the law, material equality does so in the economic and social fields in order to fully promote equality, which, together with freedom, shall inform the rule of law as a whole[35]. According to Bobbio, it seems clear that substantive or material equality means "equality with regard to material goods, or economic equality"[36].

Material equality intends to level the material conditions of individuals, not only to ensure their safety, but also to allow for an effective exercise of their individual freedom. This means that formal equality enshrined in Article 14 is linked and not contrary to material equality referred to in Article 9(2)[37]. The purpose of this latter provision is to balance to the extent possible the economic and social goods and situations[38]. In this regard, it has been argued that Article 9(2) "could be the driver of a social change, being the most conspicuous manifestation of the social State principle"[39].

The goal of material equality may require public intervention, either by removing the barriers that prevent its implementation, or by directly fostering

35. See, in this regard, Fernández, E., in *La Obediencia al Derecho.* Cuadernos Civitas, Madrid, 1994, p. 241, who argues that "the demand for a material equality different, but not opposed to moral and legal-political equality, is linked to the inclusion of social and economic objectives within democratic systems. Thus, democracy will not be only political but also social democracy". Along this line, see Carrit, E. F., in "La Libertad y la Igualdad" in Quinton, A. (Comp.), *Filosofía Política*, translated by E. L. Suárez, Fondo de Cultura Económica, México, 1974, p. 251, where he points out that "equal ownership brings equal power, and equal power is freedom".
36. Bobbio, N., *Igualdad y Libertad*, translated by Pedro Aragón Rincón, Introduction by Gregorio Peces-Barba, Paidós ICE/UAB, Barcelona, 1993, p. 79.
37. See Ruiz Miguel, A., "La igualdad como diferenciación", *Derechos de las minorías y de los grupos diferenciados*, VV.AA., Colección Solidaridad, Escuela Libre Editorial, Madrid, 1994, p. 285. The author argues that "formal equality or equality before the law, enshrined by Article 14 of the Constitution, is not a limit but a condition –necessary but not sufficient– for real and effective equality in Article 9(2), *i.e.*, it is a negative and essential minimum upon which a positive policy can be implemented in order to remove the barriers and create the necessary conditions to attain greater equality among citizens".
38. See Pérez Luño, A. E., "Dimensiones de la igualdad material", *Anuario de Derechos Humanos*, nº 3, 1984-85, p. 258.
39. Poyal Costa, A., "Un caso concreto de interacción entre norma constitucional y realidad: el artículo 9.2 de la Constitución Española y la realización del principio de igualdad", *Boletín de la Facultad de Derecho*, UNED, nº 3, 1993, p. 39.

it by means of a positive attitude or by doing something, even granting certain benefits to someone[40]. Hence, in order to achieve material equality, public intervention may be needed, and this in turn will depend on the social reality and the situation of social disadvantage of women with respect to men.

It should be recalled that when material equality is demanded, it refers to effective equality in the social relationships of a particular historical moment. This means that it is the society itself, with its peculiarities and history, which determines the demands for material equality. This raises a problem: "what once was an egalitarian demand in a specific moment might not be so in another"[41].

Therefore, when the aim is to reach material equality between men and women, it is necessary to consider the society and the historical context to design the best way to achieve it. It is impossible to study equality disregarding the historical context, especially if we take into account that it is precisely the latter that provides the grounds to understand the demands for equality in a particular moment[42].

Equality must respond to the principle of differentiation, it cannot be based on predetermined principles but rather it has to be flexible and evolving so that, on the grounds of difference, it may adapt to social complexity. Hence, what in a historical moment can be regarded as different, and thus treated unequally, might change. Legislation and case law will define what is "different"[43].

In this regard, considering the social reality of 20th century Spain, the demand for equality between men and women has focused on employment, as the case law of the Constitutional Court reveals. In fact, the Constitutional Court itself justifies public intervention and has considered that "public action, even on a temporary basis, in favour of certain groups

40. See PRIETO SANCHÍS, L., "Los derechos sociales y el principio de igualdad sustancial", *Revista del Centro de Estudios Constitucionales*, nº 22, 1995, p. 19. According to this author, however difficult it is to realize a demand for equality, it is not impossible, since it can be implemented through a fundamental right in the form of a benefit or a fundamental right not in that form, or even by means of a requirement of formal equality.
41. CALSAMIGLIA, A., "Sobre el concepto de igualdad", MUGUERZA *et al.*, *El fundamento de los derechos humanos*, Debate, Madrid, 1989, p. 100.
42. RODRÍGUEZ-PIÑERO, M. and FERNÁNDEZ LÓPEZ, Mª. F., *Igualdad y Discriminación*, Tecnos, Madrid, 1986, consider that "a concept of equality outside the historical context in which it is applied is not practicable, neither are its nuances exactly identical depending on the subject matter", p. 47.
43. PRIETO SANCHÍS, L., "Igualdad y minorías", *Derechos y Libertades*, nº 5, 1995, p. 114, notes how "the regulatory tasks always implies an exorcice of differentiation".

historically ignored and marginalized shall not be considered as discriminatory or constitutionally prohibited"[44].

In short, Article 9(2) provides for different treatment in order to eliminate the discriminations referred to in Article 14, such as those on the grounds of sex. In addition, Article 1(1) of the Constitution enshrines equality as a fundamental value of a social and democratic State governed by the rule of law[45]. The purpose is thus to inform the whole legal system, becoming a "distribution parameter". This is what Rafael de Asís calls "equality-in-rights law"[46].

Therefore, the Constitution sets the legislative bases for promoting equality and eliminating discrimination in the 20th century, which have been further developed by the concepts of anti-discriminatory law. However, the elaboration of a rationale for different treatment has mainly been the task of the Constitutional Court.

2.2. THE CASE LAW OF THE CONSTITUTIONAL COURT

The Constitutional Court has addressed women's situation in the 20th century and has come to acknowledge a fact: the household division of work places the entire burden on women, which "hinders their access to employment, where they usually perform lower-paid tasks than men"[47]. In addition, the Court says, "it can't be ignored that, notwithstanding the Constitutional statements, there is a social reality, the result of a long cultural tradition, defined by the assignment of family care and, particularly, the care of children, to women"[48]. It has correctly understood that this may be an insur-

44. STC 216/1991 of 14 November stresses that "the Constitutional provision prohibiting all discrimination on account of sex (Article 14) is directly and immediately applicable since the entry into force of the Constitution. However, a correct interpretation thereof requires it to be systematically read together with other provisions of the Constitution, in order to preserve its unity". See also SUAY RINCÓN, J., *El principio de igualdad en la justicia constitucional*, Instituto de Estudios de Administración Local, Madrid, 1985, where it is argued that Article 9(2) of the Constitution "allows for discriminations in the legal system, although only when they favor groups and subjects socially discriminated (favorable discriminations)", p. 39.
45. For a further development of this issue, see BENGOECHEA GIL, Mª, "Algunas reflexiones sobre los valores superiores en nuestro Ordenamiento: ¿sigue el debate abierto?", in *Entre la ética, la política y el derecho: estudios en homenaje al profesor Gregorio Peces-Barba*, Dykinson, Madrid, 2008.
46. DE ASÍS ROIG, R., "La igualdad en el discurso de los derechos", *Los derechos: entre la ética, el Poder y el Derecho*, VV. AA., José Antonio LÓPEZ GARCÍA and J. Alberto DEL REAL (Eds.), Dykinson, Madrid, 2000, p. 149.
47. STC 103/1983 of 22 November.
48. STC 103/1983 of 22 November.

mountable barrier to accessing employment, as shown by the extremely low participation of married women in the labour force, compared to other social categories[49]. In this regard, the Constitutional Court has argued that actual and effective inequality "is obviously not suppressed by the simple process of ignoring it, and deepens by repealing provisions whose purpose is to compensate it"[50]. Public intervention, rather than inaction, is required.

The Constitutional Court acknowledges that women's situation in the labour market has its roots in the fact that they have traditionally been confined to household tasks, which results in a social disadvantage. For a long time and for different reasons, women were excluded from certain positions, most notably in the public sector. Therefore, the Constitutional Court has firmly rejected any paternalistic measure that actually disguises a historical discrimination. In fact, our Constitutional Court has consistently ruled against such kind of falsely protective measures[51]. It should be recalled that the latter appeared before the Democracy was established in Spain; "based on the assumption of women's inferiority (...) they were rooted in the belief of men's superiority. Due to their underestimation, women were treated leniently... which consolidated the discrimination"[52].

Hence, the Constitutional Court recognizes the existence of discrimination on the grounds of sex, and in particular defines the *indirect*

49. STC 26/ 1981 of 23 July.
50. STC 103/1983 of 22 November.
51. For example, STC 81/1982 of 21 November; STC 103/1983 of 22 November; STC 38/1986 of 21 March. In the latter, a separate opinion of Judge RUBIO LLORENTE argues that "there are good reasons to consider that such legislative compensation help perpetuate social discrimination and that, therefore, it should be eliminated in order to remove such discrimination". STC 109/1993 of 25 March explains that "This is not the place to assess the mistrust regarding protective measures for working women due to the disadvantages they may imply for them, becoming sometimes a "barrier to effective access to employment for women on an equal basis with men" [STC 28/1992 (RTC 1992\28)], since this case does not concern an "unequal consideration of the woman as a worker" (*idem*, legal basis 3) but an advantage to compensate such generally unfavorable situation of women with respect to employment. Maternity, and therefore pregnancy and birth, constitute a biological difference under protection, derived directly from Article 39(2) of the Constitution. Hence, the advantages or exceptions for women cannot be considered as discriminatory for men. However, the case here is not about a pregnancy or maternity leave, but a special authorization to take an hour off work based on the breastfeeding for a child under 9 months".
52. GIMÉNEZ GLUCK, D., *Una manifestación polémica del Principio de Igualdad: acciones positivas moderadas y medidas de discriminación inversa*, Tirant lo Blanc, Valencia, 1999, p. 154.

discrimination suffered by women and upholds the implementation of *affirmative action* instead of paternalistic measures.

2.2.1. STC 128/87 – Definition of the concept of affirmative action in favour of women

In spite of the valuable contributions of the Constitutional Court in support of the equality between men and women, its case law has not always been absolutely clear regarding differentiated treatment (affirmative action). Judgment 128/87 marks two clear phases on this issue:

1.- In its first rulings, the Constitutional Court had upheld an undifferentiated treatment towards sex[53]. Even when it came to groups *under the presumption of discrimination*, it considered that the difference had to be assessed according to a reasonable and teleological basis. It was not, then, inclined to favour historically discriminated groups. Referring to the discrimination on the grounds of sex, it even argued that "the protection of women is not, by itself, a sufficient reason to justify differentiation, nor is the fact that the subject who would benefit from the protection is the woman as such, since that would be contrary to Article 14 of our Constitution"[54].

2.- On the other hand, Judgment 128/87, of 16 July, allows inferring a different position of the Constitutional Court. It abandons the neutral approach and addresses sex-based discrimination taking into account the historical exclusion of women, defining for the first time the criteria to understand affirmative action as opposed to falsely protective or excessively paternalistic measures.

The case addressed in that ruling was brought by an INSALUD (Spanish National Health Institute) employee, in appeal before the Constitutional Court, for considering that the different nursery benefits granted by his employer were discriminatory. While all female workers with children under six years, irrespective of their civil status, were entitled to a nursery benefit, only widowed men could receive such benefit. The INSALUD puts forward two arguments: first, it considers that the nursery benefit is an "ex gratia benefit" rather than retribution, so it is not necessary to justify its extension to all workers; second, it argues that differentiated

53. That is the case of STC 81/82 of 21 December, 98/83 of 3 March, 104/83 of 23 March, STC 42/84 of 15 December, where a different approach towards sex is provided.
54. STC 81/1982 of 21 December.

treatment is justified because the situation of female workers married and with minor children is very different to that of men also married and with minor children.

The Constitutional Court rejects the first argument on the grounds that, in spite of the entrepreneurial nature of the decision of granting an "ex gratia benefit" to certain employees, it implies an increase in their income. Therefore, such benefit is part of the rights and obligations of the employment contract. Thus, the Court requires such discretion to be subject to control, because the fact that the management of a business is exempt from an absolute principle of equality does not preclude the prohibition of differentiation considered as discriminatory by the law. Furthermore, this prohibition is ever stricter when the employer is the public administration, as was the case.

The second argument refers to the possibility of treating men and women differently due to the situation of social exclusion in which the latter have historically been. As the Constitutional Court states in that ruling, "women have even experienced attacks to the dignity of the person". The express prohibition of discrimination on the grounds of sex provided for in Article 14 of the Spanish Constitution lies in the will to put an end to women's historical situation of inferiority both in the social and legal spheres. In this case, such inferiority entails specific difficulties for women in their access to work and professional promotion. The Judgment refers to statistical data about women's labour situation (according to the relevant Labour Force Survey, only 29.1 per cent of women over 16 works, whereas the equivalent for men is 68.4 per cent). Therefore, Judgment 128/87 upholds that not all unequal treatment is contrary to the principle of equality, and that differentiated treatment –provided that it is justified– can be required in different situations by the social and democratic State governed by the rule of law in order to implement higher values like equality and justice[55].

From this point of view, affirmative action (protective measures, in the wording used by the Constitutional Court in that ruling), which is basically granted to women and, to a lesser extent, to men, is not contrary to the principle of equality, but rather intended to eliminate existing discrimination. Judgment 128/87 stresses that there is no violation of the principle of equality "by treating subjects differently in different situations according

55. See ALCOLEA TEJEDOR, P. *Discriminación laboral de la mujer. Estudio de la doctrina jurisprudencial española y comunitaria sobre la discriminación laboral de la mujer desde 1980*, Generalitat Valenciana, Conselleria de Treball i Afers Socials, Valencia, 1994, pp. 39 *et seq.*

to reasonable criteria in the view of this Court". The problem arises when reasonable criteria are analysed. Judgment 128/87 does not consider that the different treatment lies in the different situation regarding the care and support of the children, which would be contrary to Articles 14, 32(1) (equality in marriage), 35(1) (equality in work) and 39(3) (equality in the care of children) of the Constitution. The attribution of household tasks and the care of children exclusively to women –preventing married women from working outside the home–, as well as the complete exclusion of men from those activities are rejected outright.

As regards family obligations, there is no constitutional difference between men and women. The "reasonable criterion", in this case, depends on the particular disadvantage faced by the woman in charge of minor children in her access to work or in order to keep her current job. Hence, a reasonable criterion allows for a different treatment. This "reasonable criterion" requires a previous verification in order to justify the unequal treatment. It is thus necessary to check if this Judgment fulfils the triple test linked to affirmative action. Such test verifies: 1.– The existence of inequality (different legal consequences test); 2.– The desirability of equality (relevance/irrelevance of the inequality test); and 3.– The reasonability test (justification of the inequality).

1.- In the case in question, the different legal consequence arises with regard to the collective labour agreement, which grants a nursery benefit to all female workers of the INSALUD and only to widowed men.

2.- There is a relevant reason for that difference: the situation of women in the labour market, their barriers to access and remain in it, which requires a special protection in that field in order to equate them to men.

3.- In this case, the measure is reasonable, as the traditional exclusion of women from the labour market requires positive actions to level the field for them. Therefore, and given that women who are entitled to this nursery benefit are already in a disadvantaged situation with regard to men –their difficulty to access the labour market, since employers are usually discouraged by the fact that women tend to perform the household tasks–, there is a reasonable and objective ground for differentiated treatment. Without it, many women may not be able to work outside the home in order to take care of their children, whereas men who are denied such nursery benefit most probably will be able to participate in the labour market, because the conventional understanding is that if someone has to take care of the children, it is the mother.

The Constitutional Court decided in its Judgment 128/87 that there was no breach of the principle of equality. Quite on the contrary, it argued that it was "a measure intended to address the discrimination suffered by this social group according to the Constitutional mandate set out in Article 9(2)".

2.2.2. STC 145/91 – Distinction between direct and indirect discrimination

Lacking implementing legislation in the 20th century, the Constitutional Court drew from the US and European experiences in order to distinguish between direct and indirect discrimination. Like in those legal frameworks, the concept of indirect discrimination emerges in Spain in the context of the labour market, and particularly with regard to the demand for gender equality. In Spain, during this century, the most visible manifestation of indirect discrimination has been linked to occupational classification criteria and their relation to the establishment of different wages. On the basis of Article 24(2) of the Workers' Statute, some forms of classification based on categories reserved to men and women have been considered unlawful[56].

It should be recalled that there are two kinds of discrimination: direct and indirect. Direct discrimination has been defined as the differentiated, unfavourable and prejudicial legal treatment towards a person or a group, irrespective of the reasons for such discrimination[57]. It is thus an unfavourable treatment without a rational justification, "implemented explicitly on the basis of a criterion that defines the type of person who is discriminated"[58]. Direct discrimination can in turn be of two types: open or covert. The former is easily proved: the discriminator's intent is easy to spot. But covert or hidden discrimination is more difficult to prove and requires more evidence. Covert discrimination is sometimes confused with indirect discrimination, but in the latter –as opposed to the former– there is no intent on the part of the discriminator[59].

56. All this, in spite of the fact that the Supreme Court's Judgment of 5 May 1980 considers lawful to establish specifically female categories provided that the job is "of a different kind and output than those performed by men" and the difference "results from the specific features of the female sex", although regarding as unlawful any "reduction coefficients regarding women's work".
57. See SÁEZ LARA C., *Mujeres y mercado de trabajo. Las discriminaciones directas e indirectas*, Consejo Económico y social, Madrid, 1994, p. 56.
58. AÑÓN Mª. J., *Igualdad, diferencias y desigualdades*, Fontamara, Mexico, 2001, p. 30. Also along that line, BARRÈRE, Mª. A., *Discriminación, Derecho antidiscriminatorio y acción positiva en favor de las mujeres", cit.*, pp. 23 *et seq.*
59. As we shall see below, the Court of Justice of the European Union initially confused this type of direct discrimination, so-called *hidden*, with *indirect discrimination*, leading to misunderstanding among the academic literature. See in this regard the Judgment of the Court of 8 April 1976, Gabrielle Defrenne/Sabena, Case 43-75, Rec. 1976, p. 455.

While "intent qualifies direct discrimination, the outcome qualifies indirect discrimination"[60], since the latter consists in the formally neutral or non-discriminatory legal treatment that for different reasons results in prejudicial consequences affecting those groups traditionally marginalized. Apparently they are not discriminatory measures, since there is no intent on the part of the discriminator. It is their implementation and not their theoretical formulation that is problematic. The concept of indirect discrimination was shaped for the first time by the Constitutional Court Judgment 145/91[61], of 1 July, notwithstanding some precedents in our case law[62]. In this case, the Constitutional Court considered that there was indirect discrimination because the "cleaners" of a public hospital earned less than the "handymen" of that same hospital, when both occupational categories performed the same work. The Constitutional Court ruled in favour of the "cleaners", arguing that the discrimination was both direct (for having a different wage for the same work) and indirect (for the unequal valuation of equivalent works from the point of view of their nature and conditions, on the grounds of sex).

This conclusion is based on the acknowledgment of the historical discrimination of women[63]. The Court notes that discrimination regarding the groups *under a presumption* "cannot be limited to the assessment of

60. BALLESTER PASTOR, Mª. A., *Diferencia y discriminación normativa por razón de sexo en el orden laboral*, Tirant lo Blanch, Valencia, 1994, p. 45.
61. STC 145/91 of 1 July explicitly states that while direct discrimination is "the harmful differentiated treatment on the grounds of sex", *indirect discrimination* comprises "those treatments formally non-discriminatory from which derive factual consequences for workers of different sex, unequal and harmful consequences due to the different and unfavorable impact that formally or reasonably equal treatments have on workers of both sexes".
62. In this regard, BALLESTER PASTOR, Mª. A., refers to precedents in judgments like those of our Supreme Court of 15 July 1986 and 3 March 1988, where it was argued that certain requirements to access employment may be considered discriminatory if they are irrelevant to the job, in *Diferencia y discriminación normativa por razón de sexo en el orden laboral, cit.*, pp. 41 *et seq.*
63. See STC 145/91 of 1 July: "The Constitutional prohibition of discrimination based on personal characteristics and particularly on sex, as a sign of women's belonging to a specific social group historically undervalued socially, economically and legally, is related to the substantive notion of equality". See also STC 19/1989 of 31 January, which highlights that "the scope of Article 14 of the Constitution is not limited to the general clause of equality at the beginning, but it also pursues the prohibition of certain historically rooted differences, which due to the action of public authorities and social practice have placed wide sectors of the population in situations not only unfavorable but in blatant violation of the dignity of the person enshrined in Article 10 of the Constitution".

whether the differentiated treatment is, in abstract, objectively and reasonably justified; it must also examine, in particular, whether the apparently and formally reasonable justification hides or may hide discrimination contrary to Article 14 of the Spanish Constitution"[64].

The Constitutional Court refers in this Judgment to the European framework, and reiterates the difference between the initial formulation of the strict principle of equal pay for equal work and a wider concept of the principle of equal pay for works of "equal value". The Court also refers to Article 119 of the Treaty of Rome (present Article 157), noting how the wording in that provision on an "equal work", has been widely interpreted by the Community case law and extended by Directive 75/177, whose Article 1 defines the principle of equal pay as meaning, "for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration".

This broad interpretation, accepted in the European Union, applies to the case of the cleaners and the handymen, because in spite of not being strictly equal works, they have the same value from the point of view of their nature and conditions. The reason for their unequal valuation has to do with the fact of being a woman and the social and economic underestimation of women's work.

Finally, the Constitutional Court argues that in this case there is not only an easily identifiable discrimination, but the term used for one of the occupational categories ("cleaners") is also considered discriminatory.

From then on, the Constitutional Court breaks new ground by stating that the precedence given to certain aptitudes mostly held by men –hazardousness, physical effort, etc.–, thus undervaluing typically female or at least neutral characteristics (patience, skill, etc.), is an indirect discrimination[65]. Although the element of intent is essential, such type of discrimination cannot be justified. The relevant aspect is the effect or result of the act, standard or decision, which in this case was discriminatory[66].

64. STC 145/1991 of 1 July adds that "in order to assess the different treatment in relation to pay, the only factor under consideration can be the work effectively performed and the specific objective circumstances not related –either directly or indirectly– to the person's sex, save in exceptional cases, restrictively considered, in which sex may be a key element in the professional competence for the performance of certain tasks. Only the effective difference between the works performed, valued in a non-discriminatory way, may allow distinguishing, as regards pay, according to the essential link between pay and the work for which the former is the consideration".
65. See BALLESTER PASTOR, Mª. A., *Diferencia y discriminación normativa por razón de sexo en el ordén laboral, cit.*, pp. 42 *et seq.*
66. See RODRÍGUEZ-PIÑERO, M. y FERNÁNDEZ LÓPEZ, Mª. F., *Igualad y discriminación, cit.*, p. 171.

3. THE DEMAND FOR EQUALITY BETWEEN MEN AND WOMEN IN 20TH CENTURY EUROPE

The European Union undertook the commitment to improve women's situation and provide equal opportunities, particularly regarding employment. The Treaty of Rome in 1957, establishing the European Economic Community, enshrined equal treatment between men and women from the perspective of an equal pay.

The development of an equality legislation started with Article 119 of the Treaty of Rome, which required Member States to ensure the application of the principle of equal pay for equal work between men and women[67]. However, it was not until 1975, the "International Women's Year", when the Community developed a significant regulatory activity that consolidated the principle of equality between men and women as one of the core principles governing the European social policy in the 20th century. The interpretative work of the Court of Justice has also played a relevant role in the extension, scope and applicability of this Community principle[68].

The referred Article 119 of the Treaty of Rome was an important starting point as regards equal treatment between men and women. At the time of its drafting, in 1957, national legislations in most Member States did not expressly prohibit discrimination on the grounds of sex, since at that time the European Union had mainly an economic purpose. That provision was originally included to avoid a competitive disadvantage for France due to its social policy. The social impact of such Article was only clear at a later moment, especially under the watchful eye of the Court of Justice. Over time, this provision and all the subsequent secondary legislation have shown that the European Union is not merely an economic organization, but it also intends to achieve social progress and better life and working conditions for the Europeans.

67. Article 119 of the Treaty of Rome states that: "*Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this Article, "pay" means the ordinary basic it minimum wage or salary and any other consideration, whether n cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job*".
68. See ALARCÓN CARACUEL, M. R., "El principio de igualdad en el Derecho de la Unión Europea" en *La igualdad de trato en el Derecho Comunitario Laboral*, Coord. de J. CRUZ VILLALÓN, Aranzadi, 1997, pp. 10 *et seq.*

Hence, social cohesion is the basis for effective equality; it is the guiding principle for the creation of the European social area. During the 1970s, in the European Communities it was thought that a regulatory framework would bring more equality between men and women[69]. However, in the 1980s it was clear that the legislative measures that established equal treatment were not enough by themselves to eliminate the *de facto* inequalities affecting women. The drafting of affirmative action programs allowed identifying and eliminating any actual discrimination, as well as compensating the effects of previous discrimination[70]. Throughout its history, the European Union has adopted Action Programs regarding equal opportunities including legal measures, financial support and a policy based on affirmative action aimed at counteracting the obstacles that contribute to an unequal distribution of roles between men and women[71].

As from 1992, with the Treaty of Maastricht, the Community was strengthened by the establishment of a Single Market without borders and barriers between Member States. This Treaty, an especially Article 6 of Protocol 14, turned the prohibition of discrimination from a mere principle of economic policy to an actual fundamental right to equal treatment between men and women in all aspects of social life, and not only with regard to pay, as it was previously conceived in the Treaty of Rome. This provision reproduces Article 119 of the referred Treaty of Rome (present Article 157), but adds a third paragraph whose wording is: "This Article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers".

3.1. REGULATORY LEVEL: DIRECTIVE 76/207

The concept of indirect discrimination has its roots in Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training

69. García Añón, J., "El principio de igualdad y las políticas de acción afirmativa. Algunos problemas de la dogmática jurídica y del Derecho europeo", *El vínculo social: ciudadanía y cosmopolitismo*, Tirant lo Blanc, Valencia, 2001, p. 314, has pointed out that "it would not be until the 1970s that a set of Directives developed certain aspects related to equal treatment between men and women in specific fields of labour law".
70. See Alarcón Caracuel, M. R., "El principio de igualdad en el Derecho de la Unión Europea", en *La igualdad de trato en el Derecho Comunitario Laboral*, J. Cruz Villalón (Coord.), Aranzadi, 1997, p. 6.
71. See VV. AA, *Igualdad de trato entre hombres y mujeres en la jurisprudencia europea*, Consejería de la Presidencia, Dirección General de la Mujer, Madrid, 1993, pp. 45 *et seq.*

and promotion, and working conditions. According to this Directive, the principle of equal treatment does not only apply to cases of discrimination with regard to pay. Any form of discrimination based on sex, either direct or indirect, as regards access to employment, professional training and promotion, and general working conditions is also prohibited. The Directive intends to address the problem of discrimination, since it is not only relevant for the access to employment, but also at a later stage, at the workplace, for example. Many women suffer disadvantages for being women once they have accessed the labour market. For instance, a woman's choice of a part-time working scheme or taking a maternity leave is still indirectly punished.

Directive 76/207 not only requires equal pay for equal work, but also for a work of equal value. In order to determine what should be considered as a "work of equal value", the Commission drafted a wide classification system constantly updated to take into account the technological and social development. The practical effect of the Directive lies mainly in the obligation for Member States to create legal proceedings enabling workers who consider themselves victims of discriminatory treatment to file a complaint. Further, Member States are required to adopt the necessary measures to protect the complaining workers. Although the Directive is still unclear on the concept of indirect discrimination, it is part of the EU Directives combating sex-based discrimination in 20th century Europe[72].

3.2. JUDGMENTS OF THE COURT OF JUSTICE IN THE KALANKE AND MARSHALL CASES

As regards affirmative action in favour of women in the European framework during the 20th century, one of the most significant decisions was the

72. In fact, during the 20th century equality between men and women in Europe was not only ensured by Article 119 but also by Protocol 14 to the Treaty of Maastricht and the Directives on equal treatment and non-discrimination on the grounds of sex. Such Directives are: Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

Kalanke judgment of 17 October 1995 (Eckhard Kalanke/Freie Hansestadt Bremen), on the priority of a woman candidate over a man in the field of employment. Mr Kalanke considered that he had been discriminated on the grounds of sex. He held a diploma in horticulture and landscape gardening, had worked since 1973 as a horticultural employee in the Parks Department and acted as permanent assistant to the Section Manager, and he had applied for the position of Section Manager. A woman, Ms Glissmann, holder of a diploma in landscape gardening since 1983 and employed in the Parks Department since 1975, had also applied for that same position. The woman candidate was appointed to the position pursuant to the "Bremen Law on Equal Treatment for Men and Women in the Public Service", which granted priority to women with the same qualifications in sectors where they are under-represented.

The Court of Justice ruled that there had been discrimination on the grounds of sex against Mr Kalanke and that Directive 76/207 precluded national rules such as the Bremen Law. The Court opted for a restrictive interpretation of paragraph 4 of Article 2 of the referred Directive, which states that "this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities". Therefore, the Court considers that the Bremen Law exceeds the limits of the exception provided for in paragraph 4 of Article 2 of the Directive. With this decision, the Court of Justice defines as an "exception" something that was regarded as generally applicable, so that the objective reached by Directive 76/207, and in general by the equality policy (*i.e.*, levelling the field between men and women and helping the latter access to positions of responsibility) could be jeopardized by such a narrow interpretation. The Court of Justice ruled that women equally qualified could not be given direct priority under a national rule.

Some authors have argued that the referred judgment "must be regarded as a clear example of a wrong decision"[73]. According to De Simone, this ruling implies that any affirmative action granting a right to a woman would be objectionable, since it would limit a man's right[74].

In fact, if the restrictive interpretation in *Kalanke* were always applied, it would not be possible to implement most of the Community and national programs regarding affirmative action[75]. It could be inferred from that

73. Atienza, M., "Un comentario al caso Kalanke", *Doxa*, nº 19, 1986, p. 111.
74. See De Simone, G., "A proposito di azioni positive I Regole di eguaglianza delle azioni positive", *Ragion Practica*, nº 8, 1997/1998, p. 87.
75. Rodríguez-Piñero, M., "Igualdad de oportunidades y prioridad de la mujer en los en la Sentencia Marshall del TJCE", *Relaciones Laborales*, nº 29, pp. 4-5.

judgment that the Court of Justice does not support a national regulation (in the case of equal qualification of different-sex candidates) immediately favouring the woman, even if women are under-represented. All potential measures that could be adopted by the European Parliament in favour of affirmative action or reverse discrimination would be excluded. It would be a backwards step. Such strict conception of equality "is contrary to the openness shown by the case law of the Court of Justice on indirect discrimination"[76].

According to the Kalanke judgment, EU Law would be opposed to quotas or legal mechanisms that grant an absolute priority to women. The Kalanke decision allows for *equality from the outset* or equality of opportunities, but it rejects *equality at the finish line* or equality of outcomes. However, the Court fails to recognize that the moment when most discrimination takes place is precisely "that of the appointment"[77], which takes place after the definition of the equality of opportunities, thus affecting the equality of outcomes.

Social reality shows that where there is equal merit between a man and a woman, in a large percentage of cases the man will be chosen, since he benefits from an implicit preference due to social mentality and structures[78]. It seems clear that mere equality of opportunities included in the traditional mechanisms have failed to ease women's access to the most valued social positions[79].

The problem is that in *Kalanke*, the Court considers that the Bremen Law establishes a strict quota, *i.e.*, an absolute preference for being a woman, and not a flexible quota requiring the candidate to fulfil certain conditions in order to be appointed to the post. However, as Mª. José Añón points out, in the Kalanke case "it is the Court itself who qualifies the preferential measure as absolute and unconditional (or automatic), but neither

76. Ballestrero, M. V., "Acciones afirmativas. Punto y aparte", *Politica del Diritto*, 1990, p. 98.
77. González Hernández, E., "Igualdad, discriminación positiva y Constitución. Su incidencia en el Derecho Comunitario", *Sociedad y Utopía, Revista de Ciencias Sociales*, nº 13, 1999, p. 39.
78. See Millam Moro, L., "Igualdad de trato entre hombres y mujeres respecto ala promoción profesional en la jurisprudencia comunitaria: igualdad formal versus igualdad sustancial (Comentario a la Sentencia del TJCE de 17 de octubre de 1995, as. C. 450/93 Marshall", *Revista de Derecho Comunitario europeo*, nº 3 (July-December), vol. I, 1998, p. 195.
79. Ruiz Miguel, A., "La discriminación inversa y el caso Kalanke", *Doxa*, nº 19, 1996, pp. 136-137.

the Bremen Law nor the Federal Labour Court (*Bundesarbeitsgericht*) use that terms"[80]. Hence, the quota in the Kalanke case could not be considered a strict quota system, since women's priority is explicitly subject to two factors: equal qualification and under-representation of women in the relevant sector. Since there are certain requirements, this would constitute a flexible quota system.

This decision caused a stir in the Community institutions, particularly in the Commission, which had applied since 1992 a similar policy to the one provided in the Bremen Law. Soon after the Kalanke case, the Commission issued a "Communication"[81] on the interpretation of the judgment in order to justify the support the Commission and other Community bodies such as the Council had given to certain affirmative action policies in the 1980's[82]. The Communication assumes that the Court only excludes automatic quota systems, "and downplays the statement on the replacement of equality of opportunities by equality of outcomes, as formulated in paragraph 23 of the Kalanke judgment"[83]. The Communication "forces the interpretation of Kalanke in order to guarantee consistency of the case law of the Court of Justice"[84]. In the Communication, the Commission argues that the Kalanke judgment may be interpreted in the sense that the Court excludes all quota systems or that only strict quotas are excluded. The conclusion reached by the Commission is that the second interpretation is preferable, so that the Bremen Law established a strict quota by granting an "automatic priority" and did not provide for individual exceptions, which is hardly acceptable. Actually, the Communication reinterprets the Kalanke judgment in order to prevent it from affecting the gender equality policy developed until that moment in the European framework.

Fortunately, the situation changed in the Marshall Judgment of 11 November 1997 (case C-409/95). If it were not for this decision, the Kalanke case would have been a turning point in European anti-discriminatory

80. AÑÓN, Mª. J., *Igualdad, diferencias y desigualdades, cit.*, p. 66.
81. This Communication of the Commission was entitled "Communication from the Commission to the European Parliament and the Council on the Interpretation of the Judgment of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v. Freie Hansestadt Bremen, COM (96) 88 final", of 27 March 1996, Brussels.
82. See GONZÁLEZ HERNÁNDEZ, E., "Igualdad, discriminación positiva y Constitución. Su incidencia en el Derecho Comunitario", *Sociedad y Utopía, Revista de Ciencias Sociales*, nº 13, 1999, p. 194.
83. GARCÍA AÑÓN, J., "El principio de igualdad y las políticas de acción afirmativa. Algunos problemas de la dogmática jurídica y del Derecho europeo", *cit.*, p. 315.
84. GIMÉNEZ GLUCK, D., *Una manifestación polémica del Principio de Igualdad: acciones positivas moderadas y medidas de discriminación inversa, cit.*, p. 198.

law[85]. This ruling corrects the Kalanke judgment, since it considers that to stay within the limits of Directive 76/207, the priority given to women cannot be unconditional and absolute. This is an interpretative shift, because the Kalanke case did not consist of an unconditional appointment of the woman candidate (since she had the same qualification as the man candidate). In the Marshall case, the Court of Justice returns to the interpretative line set out by the Commission.

The Marshall case calls for the interpretation of the same parts of Directive 76/207/EEC, which was supposedly breached by paragraph 5 of Article 25 of the Law on Civil Servants of the Land North Rhine-Westphalia[86]. Pursuant to this provision, Hellmut Mashall was not promoted to a position of teacher in a first-grade secondary school in his city, Schwerte, to which a female candidate equally qualified was appointed. The Court of Justice, in a decision of 11 November 1997, ruled that this provision, unlike the one considered in the Kalanke case, contained a "saving clause" by means of which "women's promotion is not given automatic priority if there are criteria specific to the male candidate that tilt the balance in his favour"[87].

This judgment reinterprets the Kalanke decision, "reducing it to a proportionality test"[88]. The Court notes that the measure in question would only be justified if it respects the proportionality principle, that is, "if it is necessary and appropriate to the objective pursued: removing the *de facto* barriers to equal opportunities between men and women"[89]. The Court argues that equal qualification does not imply by itself equal opportunities. Therefore, "the judgment admits measures for promoting equality of opportunity, but rejects what it considers, in line with the former case, "an absolute and unconditional priority", which is deemed as discrimination

85. REY MARTÍNEZ, F., "Discriminación positiva de mujeres (Comentario a propósito de la Sentencia del Tribunal de Justicia de la Comunidad de 17 de octubre de 1995, asunto Kalanke)", *Revista Española de Derecho Constitucional*, nº 47, 1996, p. 317.
86. Paragraph 5 of Article 25 of the Law on Civil Servants of the Land North Rhineland-Westphalia states that: "Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour".
87. GARCÍA AÑÓN, J., "El principio de igualdad y las políticas de acción afirmativa. Algunos problemas de la dogmática jurídica y del Derecho europeo", *cit.*, p. 318.
88. GIMÉNEZ GLUCK, D., *Una manifestación polémica del Principio de Igualdad: acciones positivas moderadas y medidas de discriminación inversa, cit.*, p. 198.
89. AÑÓN, Mª. J., *Igualdad, diferencias y desigualdades, cit.*, p. 67.

prohibited by the Directive"[90]. Ultimately, the Court tries to link this case to the previous one and "accepts this provision because it does not concern equality of outcome but of opportunity"[91].

That is the reason why this judgment is considered compatible with the Directive, since it is based on the priority given to women in a situation of equal qualification and capability. Up to this point, the Court's reasoning seems convincing, but the problem arises when it introduces a clause that literally states that "unless reasons specific to an individual male candidate tilt the balance in his favour (...) provided that (...) such criteria are not such as to discriminate against the female candidates". In this regard, José García Añón has noted that, according to the Court's configuration of affirmative action, they would consist of "exceptions to rights rather than adopted policies"[92]. Again, although the Marshall decision intends to "correct" the errors in the Kalanke judgment, the introduction of such clause is a legal turn difficult to justify within a European policy aimed at equality.

In conclusion, it could be said that in the 20th century, both in Spain and in Europe, the foundations are laid for the recognition of women in the work sphere, but much remains to be done in order to achieve effective equality between men and women. In the words of Rodríguez-Piero and Fernández López, "there can be little doubt that women are the disadvantaged group intended to be placed in an equal position by means of the prohibition of sex-based discrimination, but such discrimination is in turn the result and reflection of a global situation of disregard of women with deep historical and cultural roots"[93].

90. Añón Mª. J., *Igualdad, diferencias y desigualdades, cit.*, p. 73.
91. De Asís Roig, R., *Sobre el concepto y el fundamento de los derechos, una aproximación dualista*, Cuadernos Bartolomé de las Casas nº 17, Instituto de derechos humanos Bartolomé de las Casas, Dykinson, Madrid, 2001, p. 36.
92. García Añón, J., "El principio de igualdad y las políticas de acción afirmativa. Algunos problemas de la dogmática jurídica y del Derecho europeo", *cit.*, p. 327.
93. See, Rodríguez-Piñero, M. and Fernández López, Mª. F., *Igualdad y discriminación, cit.*, p. 69.

Chapter 4

Rights of indigenous people from the classics*

DIEGO BLAZQUEZ
Instituto de Derechos Humanos Bartolomé de las Casas
Universidad Carlos III de Madrid

1. A TITLE THAT REQUIRES AN EXPLANATION

Felix Cohen told once how the new Commissioner for Indian Affairs, "being a kind and generous soul" following his appointment organised a Congress for all stake holders to finally find a solution to the dilemma that the US had not been able to resolve for a decade: "How could we Americanise Indians?" After presenting his introductory remarks, "... a copper figure stood up and very calmly and solemnly stated:

> *"Please forgive me for reminding you that my people was already composed of Americans thousands of years before your people arrived. Therefore, the question is not how can you Americanise us, but rather, how can we Americanise you. Actually, we have been trying to do it for a long time now. Sometimes we are discouraged with the results. But we shall keep on trying.*

* The rights of indigenous from the classics was published for the first time in "Avances en la protección de los derechos de los pueblos indígenas/coordinated by J. Daniel Oliva Martínez, Fernando M. Mariño Menéndez, 2004, ISBN 84-9772-364-3, pp. 25-44. The first note of the text intended to acknowledge the support and on-going collaboration of Professors Fernando Mariño Menéndez and J. Daniel Oliva, organisers of the First Conference of Young Researchers on Indigenous Peoples in December 2002, shortly before the reading of the doctoral thesis.